

wfo

3 FILED
O'Clock p.m.
MAY 20 2011

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI**

DIVISION PRO TEM B

HON. WARREN R. DARROW

CASE NUMBER: V1300CR201080049

TITLE:

STATE OF ARIZONA

(Plaintiff)

vs.

JAMES ARTHUR RAY

(Defendant)

By: Diane Troxell, Judicial Assistant

Date: May 20, 2011

COUNSEL:

Sheila Sullivan Polk
Yavapai County Attorney
Bill Hughes, Esq.
Deputy Yavapai County Attorneys

(For Plaintiff)

✓ Thomas K. Kelly, Esq.
425 E. Gurley
Prescott, AZ 86301

Luis Li, Esq.
Brad Brian, Esq.
Truc Do, Attorney at Law
Miriam Seifter, Attorney at Law
MUNGER TOLLES & OLSON LLP
355 S. Grand Avenue, 35th Fl.
Los Angeles, CA 90071

(For Defendant)

**UNDER ADVISEMENT RULING ON MOTION TO EXCLUDE PROPOSED TESTIMONY OF
LATE-DISCLOSED WITNESS DAVID KENT**

The Court has considered the Defendant's motion, the State's response, the reply and the arguments of counsel.

Although the State apparently attached a copy of the David Kent email of March 12, 2011, to its 45th Supplemental Disclosure filed March 14, the State has not filed a motion and affidavit in accordance with the formal requirements of Rule 15.6, Ariz.R.Crim.P.; rather, the State has taken the position that Rule 15.6 does not apply to "witnesses previously disclosed to Defendant." State's Response, p.6. Although the State mentions that it "first disclosed Dr. Kent on November 19, 2010," the State concedes that he was not listed as an expert or fact witness until March 14, 2011, which was one month after jury selection began and two weeks after opening statements were given. Thus, if David Kent's proposed testimony is intended to be a means of presenting "material and information" not previously disclosed, Rule 15.6(d) is clearly applicable.

Based on the evidence presented in pretrial hearings and at trial, this Court concludes that the "material and information" that the State seeks to introduce through the testimony of David Kent were not previously disclosed. Indeed, the State contends that David Kent "provides the link the Court has found lacking between the prior sweat lodge ceremonies and the signs and symptoms observed by lay witnesses and the medical expertise to confirm the cause was exposure to heat in the 2008 sweat lodge." State's Response, p. 9. As noted by the Defendant, Dr. Kent's testimony would essentially "introduce an entirely new set of alleged facts." Reply, p. 4. This issue was not brought to the Court's attention until April 28, 2011, more than ten weeks after the start of the trial. Prior to that time the only direct medical evidence of heat-related illness, of any type or degree, in prior sweat lodge ceremonies was the medical records relating to the Daniel P incident in 2005. To the Court and other lay persons, Daniel P's medical records would not indicate a diagnosis of a life-threatening condition. Dr. Kent's anticipated testimony would completely alter this factual setting by possibly interjecting expert, medical evidence – evidence provided by a person who claims, in effect, to be a treating physician – that multiple participants in the 2008 ceremony suffered serious, life-threatening medical conditions caused by exposure to heat.

As Dr. Kent's proposed testimony would convey previously undisclosed information, noncompliance with Rule 15.6 alone would require preclusion. The Court acknowledges, however, that preclusion of a witness may be an unduly harsh sanction for late disclosure in light of the considerations mandated by Rule 15.7(a) and in light of a basic concern for the integrity of the trial process. The Court therefore will address the substantive issues raised by this disturbing instance of extremely late disclosure.

The State has not sufficiently explained the delay in discovering and disclosing this witness, who is both a fact and expert witness, and his surprising proposed testimony until one month into the trial. The pleadings on this motion indicate that since 2009 the State has possessed lists of Spiritual Warrior participants. There has been testimony indicating that the Yavapai County Sheriff's Office devoted extensive time and resources to investigating this case; much of this time was spent contacting participants of the 2009 and previous Spiritual Warrior seminars. With the exercise of due diligence, the information allegedly known by David Kent could have been discovered much earlier.

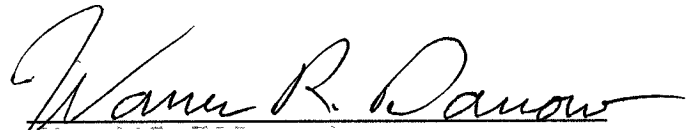
The Court is also concerned regarding the specific manner in which this witness recently came to the attention of the State. The State has not addressed to what extent David Kent has complied or not complied with the efforts of the parties and the Court to ensure meaningful enforcement of the rule of exclusion of witnesses in this highly publicized case. Nor has the State indicated to what extent Dr. Kent has been admonished after he informed the State via email on March 12, 2011, of his interest in the trial. The pleadings indicate that the State did not conduct a comprehensive interview of Dr. Kent until April 4, 2011, more than three weeks after his email. Dr. Kent's proposed testimony appears to relate to specific evidentiary matters that have been discussed and argued extensively in open court. Thus, the possibility of a significant violation of the rule of exclusion exists.

The most important factor in the determination of this motion, however, is the likely prejudice to the Defendant that would result from the Court extending the time to complete disclosure and permitting use of the information. The proposed testimony of Dr. Kent reveals for the first time specific claimed observations and expert medical opinions that would have been directly relevant to the Rule 404(b) proceedings, yet there was no similar

medical evidence adduced at that hearing. The Court would also note that the excerpts of Dr. Kent's interview attached to the State's response suggest that his proposed testimony may be characterized as remarkable, especially when considered in light of the evidence presented to date. In short, the information is truly new to this case, and, as noted in the reply, the defense might be forced to conduct extensive investigation and call additional witnesses in order to respond to this new factual and expert information. The Court concludes that permitting the testimony of this late-disclosed expert witness would not be consistent with the purpose of the Rules of Criminal Procedure as stated in Rule 1.2 and with the Defendant's right to and the public's interest in a fair and orderly trial process.

IT IS ORDERED granting the Defendant's motion to preclude the testimony of David Kent.

DATED this 20th day of May, 2011.


Warren R. Darrow
Superior Court Judge

cc: Victim Services Division